U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. MARTIN and DEPARTMENT OF THE AIR FORCE, AIR FORCE ACADEMY, Colorado Springs, CO

Docket No. 02-942; Submitted on the Record;
Issued January 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether an overpayment of $1,572.21 occurred in appellant's case; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault and therefore not entitled to waiver of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by deducting $157.22 every four weeks from his compensation.

Appellant's claim, filed on May 23, 1962 after he hurt his back while loading a safe onto a pickup truck, was accepted for a lumbar sprain and herniated discs. Appellant underwent surgical procedures but stopped work in 1977 and did not return.

While receiving compensation, appellant completed several annual affidavits of earnings and employment (Form CA-1032). These forms contain the following statement:

> "The basic rate of compensation is 66 2/3 percent of the applicable pay rate if the claimant has no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if one or more dependents are eligible for compensation. You must therefore answer the questions below to ensure that your compensation is paid at the correct rate. You may claim additional compensation for a dependent if you have a spouse who is a member of your household."

Appellant completed the CA-1032 form on January 30, 1996 certifying that he had one dependent, his wife, who lived with him. On January 3, 1998, January 4, 1999, January 4, 2000 and January 26, 2001 he certified that his wife was his dependent and lived with him.

By letter dated September 22, 2001, appellant's wife stated that she was now living in Alabama and working at a fast food restaurant. She added that she had been away from the marital home since April 16, 2001, that her husband was "in the process of getting a divorce," and that she would become a legal resident of the state in October. Appellant's wife asked what part of her husband's retirement check and health insurance she would be eligible.

On September 27, 2001 the Office advised appellant that because he had been separated from his wife since April 16, 2001 he was not entitled to augmented compensation and effective October 7, 2001 he would be paid at the two-thirds rate. The Office added that it would calculate the overpayment from April 16 to October 6, 2001.

A telephone memorandum noted that appellant told the Office that his wife "just up and left him" and that "as far as he was concerned," they were still married. He added that neither had filed for a divorce, that his wife was still covered by his health insurance, and that he paid $500.00 a month on a debt consolidation loan and she paid $600.00.

On November 16, 2001 the Office informed appellant of its preliminary determination that an overpayment of compensation of $1,572.21 had occurred because his wife left the marital residence on April 16, 2001 and he was paid augmented benefits until October 6, 2001. The Office found that appellant was at fault in creating the overpayment because he had not paid regular support during that time and therefore had no eligible dependents to qualify for the augmented rate. The Office informed appellant of his options to request a telephone conference, a hearing, or a decision on the record, and submit financial documents showing his monthly income and expenses.

Appellant did not respond, and on January 11, 2002 the Office issued a final decision, finding that appellant was at fault in creating the overpayment because he failed to report that his wife was no longer living with him. The Office determined that $157.22 would be deducted from appellant's continuing compensation every four weeks.

The Board finds that this case is not in posture for decision.

The basic rate of compensation under the Federal Employees' Compensation Act[1] is 66 2/3 percent of the injured employee's monthly pay.[2] When the employee has one or more dependents as defined by the Act, he is entitled to have his compensation augmented at 8 1/3 percent, for a total of 75 percent of pay.[3]

Under the Act, a spouse may be "(1) a wife, if-- (A) she is a member of the same household as the employee; (B) she is receiving regular contributions from the employee for her support; or (C) the employee has been ordered by a court to contribute to her support."[4]

The Board has held that the test for determining dependency under the Act is whether the person claimed as a dependent "looked to and relied, in whole or in part, upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8105(a).

[3] 5 U.S.C. § 8110(b).

[4] 5 U.S.C. § 8110(a); *see also Nancy J. Masterson*, 52 ECAB ___ (Docket No. 00-1434, issued September 11, 2001).

living."[5] In *Sam R. Ekovich*,[6] the Board considered the situation where a spouse makes regular contributions for health insurance by paying for a health plan that covers both the employee and the spouse. In *Ekovich* the Board found that the spouse was not a dependent because the employee never told his wife that he had maintained health insurance and she had obtained her own. Therefore, the Board reasoned that the spouse could not have looked to and relied on his contribution to cover her health insurance.[7]

In this case, appellant had been receiving augmented compensation for many years. He did not dispute that his wife left him on April 16, 2001, moved to Alabama, and intended to establish legal residence there. Appellant stated that he continued paying $500.00 a month on a joint debt consolidation loan and that he carried family health insurance, for which he paid $161.82 every four weeks throughout the period of his wife's absence from the marital home.[8]

The record requires further factual development before a determination can be made as to whether regular contributions for health insurance were sufficient to establish the wife as a dependent in this case. In a letter to the Office dated September 22, 2001, appellant's wife noted that she was now living in Alabama and was working in a fast food restaurant. She inquired specifically regarding her eligibility for her husband's health insurance and retirement benefits. This inquiry suggests that the wife was looking to and relying on her husband's health insurance coverage. Additional relevant information which the Office should obtain to determine whether the wife looked to and relied on her husband's health insurance coverage would include the amount of the wife's monthly income and expenses (including medical expenses), and opportunities to purchase health insurance on her own.

The case requires further development to determine whether appellant's spouse relied on his health insurance and could, therefore, be considered a dependent during her seven-month absence from the marital home. Accordingly, the case will be remanded to the Office to secure additional information relevant to section 8110(a)(1)(B).[9] After such development as the Office deems necessary, a *de novo* decision shall be issued.

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[5] *Helyn E. Girmann*, 11 ECAB 557, 559 (1960). *But see Santos Bonilla Orsini*, 35 ECAB 1121, 1122 (1984) (finding that appellant failed to establish that the employee's contributions provided a "means of maintaining or helping to maintain a customary standard of living").

[6] 37 ECAB 113 (1985).

[7] *Id.* at 115.

[8] Appellant did not respond to the Office's preliminary determination dated November 16, 2001. However, the record contains an earnings and employment report form signed by appellant on January 22, 2002, which stated that his wife did not live with him but that he made direct payments to her until September 2001 when she advised him she was not coming back to live with him. The record also contains a January 31, 2002 letter from appellant's wife stating that she was back home with him, that he had sent her checks while she was in Alabama, and that she wanted the health insurance and disability compensation adjusted back. None of this evidence was before the Office when it issued its January 11, 2002 decision. Therefore, the Board has no jurisdiction to review this evidence. *See* 20 C.F.R. § 501.2(c); *Thomas W. Stevens*, 50 ECAB 288, 289 n.2 (1999) (the Board is precluded from reviewing evidence that was not before the Office when it issued its final decision).

[9] 5 U.S.C. § 8110(a)(1)(B).

The January 11, 2002 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
January 7, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member